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January 26, 2015

Lawrence H. Norton

T 202.344.4541  
F 202.344.8300  
LHNorton@Venable.com

**BY HAND DELIVERY**

Jeff S. Jordan  
Assistant General Counsel  
Complaints Examination & Legal Administration  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

Re: **MUR 6902**  
**Response from Independence USA PAC and Diane Gubelli, Treasurer**

Dear Mr. Jordan:

This letter is submitted on behalf of Independence USA PAC ("IUSA PAC") and Diane Gubelli, in her official capacity as treasurer, in response to a Complaint filed by McFadden for Senate, alleging that IUSA PAC republished a television advertisement aired by Al Franken for Senate 2014 ("Franken Committee"), and unlawfully coordinated with the Franken Committee in violation of the Federal Election Campaign Act ("the Act") and Federal Election Commission ("Commission") Regulations.

The Complaint is based on a purported comparison of two television advertisements, one aired by IUSA PAC ("the IUSA PAC ad") and the other by the Franken Committee ("the Franken Committee ad"). As explained more fully below, the minor similarities in the ads concern information that was widely reported during the Minnesota Senate race and a few snippets of common video footage that was obtained by IUSA PAC from an Internet website. Moreover, the ads differ in significant ways, focusing on a variety of different issues and employing different text, narration, and other production features. Simply put, IUSA PAC did not republish the Franken Committee ad.

The claim of coordination is equally baseless. An affidavit attached to this submission specifically denies that any of the conduct standards from the Commission's coordination regulation were satisfied in this case, and the Complaint presents no facts to the contrary. For these reasons, and as explained more fully below, there is no reason to believe a violation occurred and the complaint should be dismissed.

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Jeff S. Jordan  
January 26, 2015  
Page 2

## **I. Background Facts**

IUSA PAC is an independent expenditure-only committee registered with the Commission. On October 30, 2014, IUSA PAC began airing a television advertisement expressly advocating for the re-election of U.S. Senator Al Franken. The IUSA PAC ad was developed and produced by media firm, SKDKnickerbocker ("SKD"), with oversight and direction from consulting firm, Gotham Acme, LLC, through its principal Howard Wolfson.<sup>1</sup>

The Franken Committee was Senator Franken's principal campaign committee for the 2014 election. According to a press release issued by the Franken Committee, it began airing a television ad on October 30, 2014.<sup>2</sup> As set forth in Mr. Wolfson's affidavit (attached hereto), neither he nor either of the two firms working on the IUSA PAC ad (Gotham Acme, LLC and SKD) performed any services for the Franken Committee; neither Senator Franken nor any representative of the Franken Committee made a request or suggestion that IUSA PAC produce or air the IUSA PAC ad; and there were no discussions concerning the IUSA PAC ad with Senator Franken or representatives of the Franken Committee.<sup>3</sup>

## **II. IUSA PAC Did Not Republish the Franken Committee Ad**

Commission Regulation 109.23 states that "[t]he financing, of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, the candidate's authorized committee, or an agent of either of the foregoing shall be considered a contribution." Here, IUSA PAC did not republish in whole or any part of the Franken Committee ad.

The IUSA PAC ad differs markedly from the Franken Committee ad. Most significantly, the two ads call attention to the Senator's positions on different issues. The IUSA PAC ad discusses Senator Franken's efforts to implement a data privacy law and strengthen Medicare and Social Security. None of these issues are addressed in the Franken Committee's ad. The Franken Committee's ad highlights Senator Franken's positions on student debt, food and drug standards, workforce training, and renewable energy. None of these issues are addressed in the IUSA PAC ad. While each ad touted Senator Franken's work on the Farm Bill, this is hardly remarkable given

<sup>1</sup> Affidavit of Howard Wolfson, at ¶¶ 1-3.

<sup>2</sup> Press Release, Al Franken for Senate 2014, Final Ad Features Senator Franken's Hard Work for Minnesota (Oct. 30, 2014), available at <http://www.alfranken.com/2014/10/30/release-final-ad-features-senator-frankens-hard-work-minnesota/>.

<sup>3</sup> Affidavit of Howard Wolfson, at ¶¶ 3-4, 6-7.

Jeff S. Jordan  
January 26, 2015  
Page 3

the extensive media coverage of the issue in the Minnesota Senate campaign and Senator Franken's emphasis on the Farm Bill in his public campaign appearances and debates.<sup>4</sup>

Equally unremarkable is the fact that each ad cited Senator Franken's efforts to "work across the aisle" and praised him for keeping "his head down" and delivering on his promises. References to Senator Franken working across the aisle can be found on the candidate's website<sup>5</sup> and in numerous media reports during the campaign.<sup>6</sup> In addition, the Minnesota Star Tribune, the state's largest newspaper, published an editorial six days before the two ads began airing, noting that "[t]hroughout his first term, *Franken has kept his head down and delivered* on what this page asked of him when he belated started his term in 2009 – policy work that benefits residents on this state. In many cases, he's done so while working with Republican colleagues."<sup>7</sup>

The advertisements also use different text, audio, graphics, and narration. While IUSA PAC used a few snippets of video that also appear in the Franken Committee ad, all of this footage was obtained from YouTube, and not directly from the Franken Committee or from the Franken

<sup>4</sup> See, e.g., Kyle Potter, *Franken Touts Farm Bill as Key Accomplishment During US Agriculture Secretary's Minnesota Trip*, ASSOCIATED PRESS (Sep. 26, 2014), <http://m.startribune.com/local/277137661.html> ("Franken has leaned heavily on the farm bill to bolster his legislative portfolio for re-election.... Agriculture is big in Minnesota — for business and politicians alike. One in every five Minnesota jobs are connected to food production, and candidates try to court some of those votes every year at the state's annual Farmfest trade show in Redwood Falls.... In both his latest ad and remarks Thursday in St. Paul, Franken stressed the bipartisan work that went into crafting and passing the farm bill. President Barack Obama signed the bill in February."); Devin Henry, *Franken, McFadden Clash on Energy Issues at Farmfest*, MINNESOTA POST (Aug. 6, 2014), <http://www.minnpost.com/dc-dispatches/2014/08/franken-mcfadden-clash-energy-issues-farmfest> ("Franken noted that he helped write the energy title of a five-year, \$500 billion farm bill that passed earlier this year (an occasion that the crowd met with the biggest applause of the day).").

<sup>5</sup> See AL FRANKEN FOR SENATE 2014, *Education*, <http://www.alfranken.com/issues/education/> (last visited Jan. 26, 2015) ("And just this year, Al reached across the aisle to work with Iowa Republican Senator Chuck Grassley on a plan that would help students and families better estimate the cost of college.").

<sup>6</sup> See, e.g., Kyle Potter, *Franken Hopes for Easier Senate Path vs. McFadden*, ASSOCIATED PRESS (Nov. 4, 2014) ("Franken continually played up his work across the aisle, name-dropping Republican Senators."); Doug Belden, *Al Franken's Record, Sized Up*, PIONEER PRESS (Oct. 14, 2014), [http://www.twincities.com/politics/ci\\_26721872/al-frankens-record-sized-up](http://www.twincities.com/politics/ci_26721872/al-frankens-record-sized-up) ("Franken, a Democrat, says he has voted Minnesotans' interests and been an effective advocate for improving the lot of the middle class, often while *working across party lines*." (emphasis added)); Belden, *supra*, ("Franken also co-wrote the energy section of the farm bill and helped secure \$55 million in grant money for mental health services in schools."); Michael A. Memloi, *Al Franken Takes Senate Job Seriously (He's Still Funny in Private)*, L.A. TIMES (Sept. 2, 2014), <http://www.latimes.com/nation/politics/la-na-franken-profile-20140903-story.html> ("[Franken] credits his distinctive laugh with helping him develop relationships across the aisle.").

<sup>7</sup> Editorial, STARTRIBUNE, (Oct. 24, 2014), <http://www.startribune.com/printarticle/?id=280371022> (emphasis added).

Jeff S. Jordan  
January 26, 2015  
Page 4

Committee's website.<sup>8</sup> Moreover, the footage constituted an insubstantial part of the total video footage used in the IUSA PAC ad.

The Commission has closed the file without taking action in prior Matters Under Review ("MUR") involving use by a third party of video footage placed on a public website by a campaign committee (often referred to as "B-roll footage").<sup>9</sup> We agree with the position of some Commissioners that no violation should be found under Regulation 109.23 where, as here, the footage was obtained without direct contact with the campaign, where the third party's advertisement does not repeat the entirety, or even a substantial portion, of the campaign ad, and where the third party adds its own text, graphics, audio, and narration.<sup>10</sup> We also agree with these Commissioners that it makes no sense, as a factual or legal matter, to distinguish such use of video footage from the use of brief quotes of a candidate on a particular issue, which is not considered republication under Regulation 109.23. However, if the Commission is inclined to reconsider the proper use of publicly-available video footage, it should establish a rule of general application through the rulemaking process and not make an ad hoc determination that conflicts with its disposition of similar complaints.

### **III. The Advertisement Does Not Meet Any of the Conduct Standards for Coordinated Communications**

The IUSA PAC ad was not a coordinated communication because it fails to meet any of the "conduct" standards set forth in 11 C.F.R. § 109.21. A communication that does not meet any of these standards cannot constitute an in-kind contribution.

The conduct standard examines the relationship between the person paying for the communication (IUSA PAC, in this case) and the candidate (Senator Franken or the Franken Committee). The conduct standard is satisfied when the facts establish any of the following: (1) the communication was created, produced, or distributed at the request or suggestion of a candidate or his campaign; (2) the candidate or his campaign was materially involved in decisions regarding the communication; (3) the communication was created, produced, or distributed after substantial discussion with the campaign or its agents; (4) the parties contracted with or employed a common vendor that used or conveyed material information about the campaign's plans, projects, activities or needs, or used material information gained from past work with the candidate to create, produce, or distribute the communication; or (5) the third-party payor employed a former employee or independent contractor of the candidate who used or conveyed material information about the

<sup>8</sup> Affidavit of Howard Wolfson, at ¶¶ 5.

<sup>9</sup> See, e.g., MUR 6667 (House Majority PAC and Friends of Cheri Bustos); MUR 6617 (Christie Vilsack for Iowa); MUR 6357 (American Crossroads); MUR 5879 (Harry Mitchell).

<sup>10</sup> See MUR 6357 (American Crossroads), Statement of Reasons of Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen, at 3-4.

Jeff S. Jordan  
January 26, 2015  
Page 5

campaign's plans, projects, activities or needs, or used material information gained from past work with the candidate to create, produce or distribute the communication.<sup>11</sup>

There are no facts alleged in the Complaint indicating that any of the conduct standards were satisfied in this matter. Further, through the attached affidavit, Howard Wolfson specifically denies that any of the conduct standards were met.<sup>12</sup> As set forth in the affidavit, Mr. Wolfson consulted about the IUSA PAC advertisement with employees of SKD, a firm that IUSA PAC retained to produce and buy media time for the IUSA PAC ad. IUSA PAC confirmed that SKD was not a vendor for the Franken Committee. In addition, neither Senator Franken nor any representative of the Franken Committee participated in any discussions about the IUSA PAC ad, and neither Senator Franken nor any representative of the Franken Committee requested or suggested that IUSA PAC produce the IUSA PAC ad.<sup>13</sup>

The Complaint also asks the Commission to infer coordination from the fact that the two ads initially aired on the same date, October 30. This was just under a week before the election, when campaigns and third-party groups commonly seek to reach voters who may not have been paying close attention to the race and influence those voters who remain persuadable. The Commission should not infer that any of the conduct standards were satisfied merely because IUSA and the Franken Committee began airing the ads at issue during this brief and often critical final stretch.

Beyond that, it is not unusual that ads favoring the incumbent and airing during the final week of the election would highlight one of the candidate's major legislative achievements (in this case, the Farm Bill) and would cite favorable characterizations of the candidate from media reports and endorsements (working across the aisle, keeping his head down and working hard to deliver on his promises). Under § 109.21, such use of publicly available information provides a safe harbor for third-party payors, unless there has been a request or suggestion that the third-party disseminate the ad. Here, there is no allegation in the Complaint that Senator Franken or the Franken Committee requested or suggested that IUSA PAC air an ad in the Minnesota Senate race, and Mr. Wolfson specifically denies that such a request or suggestion occurred.

<sup>11</sup> 11 C.F.R. § 109.21(d). We have addressed separately the last conduct standard, which is republication.

<sup>12</sup> Affidavit of Howard Wolfson, at ¶¶ 1-7.

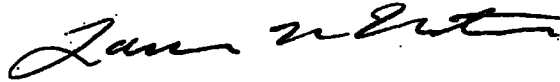
<sup>13</sup> Affidavit of Howard Wolfson, at ¶¶ 3-7.

Jeff S. Jordan  
January 26, 2015  
Page 6

**IV. Conclusion**

For the foregoing reasons, the Commission should find no reason to believe that IUSA PAC republished the Franken Committee ad or engaged in unlawful coordination with the Franken Committee. The complaint should therefore be dismissed.

Respectfully submitted,



Lawrence H. Norton  
Counsel for IUSA PAC

Enclosure